

(2002) 03 CAL CK 0046
In the Calcutta High Court
Case No : C.R.R. No. 2381 of 1995

Smt. Anita Gupta

APPELLANT

Vs

Sri Madan Lal Gupta and Another

RESPONDENT

Date of Decision : 13-03-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 127, 311, 397(3)
Evidence Act, 1872 — Section 165

Citation : (2002) 2 CALLT 483

Hon'ble Judges : Amit Talukdar, J

Bench : Single Bench

Advocate : Biswajit Basu and Kaushik Chatterjee, for the Appellant; Aniul Haque, for the Respondent

Final Decision : Allowed

Judgement

"Welfare laws must be so read as to be effective delivery systems of the salutary objects sought to be served by the Legislature and when the beneficiaries are the weaker sections, like destitute women, the spirit of Article 15(3) of the Constitution must belight the meaning of the section. The Constitution is a pervasive omnipresence brooding over the meaning and transforming the values of every measure. So Section 125 and sister clauses must receive a compassionate expansion of sense that the words used permit."

1. Krishna Iyer, J. speaking for the 3-Judge Bench of the Supreme Court in Bai Tahira v. Ali Hussain Fidaalli Chothia and Anr. : 1979 SCC 473 had lamented this position more than two decades ago which has again haunted the spectre of a destitute woman who having been deceived by her paramour and later on consort, and spurned by the Courts below in connection with her prayer for maintenance has approached this Court to countenance her fate suffered in trial Court and the Revisional Court below.

2. Little did the petitioner know when she submitted to the amorous adventures of the opposite party which ultimately ended in a "wedlock" and out of which she

presented Ajoy to the opposite party No. 2. The said matrimony after Ajoy came suffered a jinxed situation and having no course open the petitioner preferred a prayer for maintenance which was docketed as Misc. Case No. 64 of 1988 in the Court of the learned Additional Chief Judicial Magistrate, Sealdah. She prayed for relief u/s 125 of the Code of Criminal Procedure for herself and her minor child Ajoy. The proceeding of Misc. Case No. 64 of 1988 stood for disposal before the learned Judicial Magistrate, 5th Court, Sealdah.

3. During the trial she examined herself as PW 1, her land-lady's daughter as PW 2 who deposed that both the petitioner (PW1) and the opposite party (OPW No. 1) lived as husband and wife in their house where Ajoy was born in 1974. PW 3 was the Medical Officer of the Nursing Home where PW 1 gave birth to Ajoy and he proved the Birth Certificate (Ext. 4) showing her as wife of OPW No. 1. PW 4 was a clerk of the School where Ajoy son of OPW No. 1 was admitted and he proved the Certificate of the Admission Register (Ext. 5). PW 5 proved the Birth Registrar of the Municipal Corporation (Ext.6) showing OPW No. 1 as the father and PW 6 proved Ext. 7, a letter from the LIC.

4. While the opposite party examined himself as OPW No. 1 and deposed that he married OPW No. 3 at Mathura on 26.1.1961 after observing all formalities of a Hindu Marriage. OPW No. 2 described herself as the daughter of OPW No. 1. OPW No. 4 knew both OPW No. 1 and OPW No. 3 as husband and wife and that OPW No. 2 as the daughter and both Ankur and Bijoy as other children.

5. By his Judgment and Order dated 10.11.1994 the learned Judicial Magistrate, 5th Court, Sealdah in Misc. Case No. 64 of 1988 dismissed the Application u/s 125, Cr. PC preferred by the petitioner but, however, directed the opposite party No. 2 to pay a sum of Rs. 500/- per month during his minority.

6. Twin cause of action resulted from the Order of the learned trial Court.

7. While the petitioner hereinabove filed Criminal Motion No. 125 of 1995 against the said Order of the learned trial Court refusing her prayer for maintenance the opposite party took out Criminal Motion No. 23 of 1995 for setting aside the Order of maintenance passed in favour of Ajoy. By the impugned Order the learned Additional Sessions Judge, 8th Court, Alipore in a common Order dismissed both the revisional applications.

8. Hence this Application on behalf of the petitioner.

9. This Court is now entrusted with the task of sorting out as to whether the fate suffered by the petitioner in the trial Court and reinforced in the revisional Court has been sealed?

10. Before entering into the nitty gritty of the cobweb of events and the string of circumstances as have been laid out in the evidence it is necessary to reiterate certain basics. Position has now been well-settled that for a destitute woman to claim any relief under Chapter-IX of the Code of Criminal Procedure she has to establish that she is the "wife" of the person from whom such relief is claimed.

11. Law is also now well-settled that the degree of proof as in a case of bigamy and the rigorous of such proof are not same as in the case of a maintenance proceeding. What is required in a maintenance proceeding for a Court to arrive at a conclusion is a "prima facie case" as has been laid down by the Supreme Court in the case of C. Rajathi v. C. Ganeshan : 1999 SCC 1118.

12. Yet it is also true that in the event it is proved that the lady cannot establish a fact that he has been legally married with the delinquent husband she is debarred from a claim. Reliance may be placed in the case of Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another, .

13. The fact remains a spartan approach to the agony of a history woman who has come before a Court of the first instance seeking relief after having been wronged by her erring husband should not be shut out by rolling down the shutters of all the trappings of the Evidence Act; and all the rigorous of cut and dry formula of proof on her face. Something more - a benign and a sublime approach should be made before a wailing damsel in distress is denied entry in the Majestic Portals of Justice simply because of some heritage formula. As it should always be borne in mind that chapter IX, Cr. PC falls within the Constitutional empathy for safeguarding the plight of the weaker sections as has been again held by Krishna Iyer, J. in Captain Ramesh Chander Kaushal Vs. Mrs. Veena Kaushal and Others, .

14. Oath versus oath two women (PW 1 and OPW No. 2) both claiming the opposite party No. 1 as their spouse. PW 1 stands vanquished in the trial Court from the game of contenders; the Revisional Court also signals its approval. The trial Court found that as OPW No. 2 was the married wife of OPW No. 1, PW 1 was not entitled to a claim of maintenance as she could not be termed as "wife" under the law. The Revisional Court found - "excepting the statement of the petitioner there is no iota of evidence to show that there was marriage between them". And I find the Order of the learned trial Court by finding - "I hold that learned Magistrate has rightly decided the question that Anita Gupta (PW 1) is not the legally married wife of Madanlal Gupta (OPW No. 1). As the learned Magistrate in the body of his Judgment discussed by the evidence on record and decided this disputed fact, "I do not find any reason to interfere with this finding."

15. This prompts me to soliloquise the hallowed observation of Ram Chander Vs. State of Haryana, :

"What is the true role of a Judge trying a criminal case? Is he to assume the role of a referee in a football match or an umpire in a cricket match, occasionally answering, as Pollock and Maitland (Pollock and Maitland : The History of English law) point out, the question "How is that" or, is he to, in the words of Lord Denning "drop the mantle of a Judge and assume the role of an advocate"? (Jones v. National Coal Board: (1957) 2 All ER 155). Is he to be a spectator or a participant at the trial? Is passivity or activity to mark his attitude? If he desires to question any of the witnesses, how far can he go? Can he put on the gloves

and "have a go" at the witness who he suspects is lying or is he to be soft and suave?"

16. As has been discussed hereinabove something more was necessary that "something more" is lacking from the pages of the findings of both the Courts below. While to countermand the claim of PW 1 of a status as the spouse, OPW No. 2 and OPW No. 3 have been brought in the witness box which persuaded the trial Court to come to their negative finding with regard to the claim of the petitioner yet there was the overwhelming evidence of PW 1 herself, PW 2 the daughter of the landlady where the petitioner and the opposite party had built a nest which saw the arrival of Ajoy. There was also the evidence of PW 3 the doctor and P.Ws. 4 and 5 who proved the Birth Certificate and the School Admission Register (Exts. 5 and 6 respectively) attributing the fatherhood of Ajoy to the opposite party. As it has been said oath versus oath the evidence of the petitioner and her witness ought to have been discerned little more if there was formidable evidence on behalf of OPW No. 1 there was equally unimpeachable evidence of PW 1 and her team of witnesses. It could not be simply thrown out with the yardstick of the marriage between the OPW Nos. 1 and 3. While OPW No. 3 spoke of her marriage at Mathura with OPW No. 1 and the description of the modes of a valid Hindu Marriage PW 1 also spoke about her marriage in 1971 and I agree with the learned advocate for the petitioner that the evidence of OPW No. 2 did not in any way go to establish the fact of the proof of validity of the marriage between OPW Nos. 1 and 3 and at best she could attribute her paternity to OPW No. 1 nothing more. It is interesting to note and I find that the learned advocate for the petitioner was right in submitting that in his show-cause; the OPW No. 1 simply stated that he was married having children but he did not give details of either the opposite party No. 2 or the opposite party No. 3. This is a bit peculiar circumstance which cannot be altogether thrown out from consideration.

17. The submission of the learned advocate for the petitioner that the learned Courts below did not consider the evidence of the petitioner in its true light also cannot be brushed aside in the light of the discussion held hereinabove. The decision of Dwarika Prasad Satpathy Vs. Bidyut Praya Dixit and Another, that where it has been proved the parties lived as husband and wife a rebuttable presumption arises. The evidence of PW 2 in this regard was very pointing.

18. I find that the said decision is squarely applicable in the facts and circumstances of the instant case. So also in the decision of K. Vimala v. K. Veera Swamy : 11(1991) DMC 52 that simply because the husband was already married that was not sufficient but the Court should also insist on strict proof of earlier marriage.

19. The other decision of a Division Bench of our Court in Dr. Ranjit Kumar Bhattacharyya Vs. Smt. Sabita Bhattacharyya, relied upon on behalf of the petitioner also has great force in the fact situation of the instant case. Therein N.K. Mitra (as His Lordship then was) speaking for the Division Bench held :

"..... though the respondent No. 1 is not entitled to get any maintenance from the appellant under the law in view of our findings made hereinabove, we should not be unmindful of the fact that admittedly the appellant lived with the respondent No. 1 for quite some years, as a result of which a child was born and it is obvious that no woman would not surrender to a man completely, for years together, unless, there is some assurance and/or act on the part of the man which may induce the woman at least to believe that she is his wife."

and Their Lordship further held -

"For such immoral activities, the appellant should not be spared altogether, though the damage that has been caused by the appellant to the respondent No. 1 both physically and mentally cannot be compensated in any way. We, therefore, direct the appellant No. 1 to pay to the respondent No. 1 Rs. 30,000/- as damages for his above misdeeds"

20. The opposite party did not appear at first when the matter was heard for some time and arguments were closed but after the matter was placed for further hearing and lower Court records were called for and again heard afresh the opposite party entered appearance through his learned advocate and made submission. His main plank of submission was that since this is the second revisional application it does not deserve any consideration and as both the Courts below have considered the question with regard to marriage the same cannot be reopened.

21. Having given a very anxious consideration to the entire scenario which has been depicted in the foregoing paragraphs and applying the ratio of the decision of Jitender Kumar Jain Vs. State of Delhi and Others, and assessing the materials independently without attracting the wrath of Sub-section (3) of Section 397, Cr. PC I find that the Order passed by the learned trial Court subsequently affirmed by the revisional Court cannot stand and has to be set aside. The learned trial Court could have evoked more responsibility during the proceeding and elicited the actual truth if necessary by recourse to Section 311, Cr. P.C. or even Section 165 of the Evidence Act but it appears the tidal bore of the evidence of OPW No. 2 and OPW No. 3 swept away the proceeding of Misc. Case No. 64 of 1998 from its feet.

22. The decisions cited on behalf of the petitioner are absolutely apposite in the fact situation of the instant case. The argument of the learned lawyer appearing on behalf of the petitioner deserves much consideration and it is found that the order requires interference.

23. The objection of the opposite party that this is a second revisional application cannot be upheld in view of the decision of Jitender Kumar Jain v. State of Delhi and Others (supra) and more so, it is in the interest of justice that the inherent powers of the Court should be exercised as indicated hereinabove. The other objection raised on his behalf that the question of marriage having been considered by both the Courts below cannot be reopened, I am afraid, also does

not merit much consideration in view of the discussions held hereinabove as something more was required.

24. Legislative intent as has bubbled up from its beneficent interpretation and galaxy of authorities of the Apex Court and all the Summit Courts of the various States of our Country manifest that it is aimed at providing relief to the destitute women and prevent vagrancy.

25. A proceeding under Chapter IX, Cr. PC does not decide right, title and interest of any of the contesting parties; but it is a summary procedure for providing speedy remedy to the weeping, mute and defenceless women who always fight an unequal battle against their erring husbands. It only provides a remedy to keep the soul intact and the body alive. It does not pass any final judgment on the question of matrimony; that is the arena of the civil Court. While the criminal Court decides the question of succour, the civil Court decides the question of title; there cannot be any confusion between the two and any peremptory magisterial finding is always liable to be pruned by a civil Court's decree and in that event a joyous delinquent husband has the recourse of Section 127, Cr. PC.

26. Gender Justice requires that the malady of the destitute women should be handled with more sensitivity as the founding fathers of our Constitution in their extreme wisdom have inculcated the divine proviso in Sub-clause (3) of Article 15 which falls under the Majestic Constitutional Sweep of Article 39 as has been held by Krishna Iyer, J. in *Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal* (supra). A socially injured woman in the journey of her jinxed matrimony while she approaches the Court for relief under Chapter IX, Cr. PC it is a transit succour for her when the question of her valid marriage is raised by a doubting husband, the decision of which is the exclusive repository of the civil Court which will decide whether the marriage is valid.

27. What is required in a proceeding under Chapter IX, Cr. PC which is covered by the Constitutional empathy is pro-active approach to provide healing balm to the gapping wounds of the silent majority who suffers unequal silence in the forecorners of their matrimonial home.

28. Anything short of that would betray the dream of our founding fathers which they nourished on the eve of the Republic.

A fresh look is necessary.

29. Accordingly, by now it is felt that the matter should go on remand again before the learned Additional Chief Judicial Magistrate, Sealdah for giving a new look to the problem in the light of the discussion held hereinabove and the ratio of the decisions which have been discussed.

30. The learned Additional Chief Judicial Magistrate will now keep the proceeding to her own file, endeavour to conclude the entire process as known to law, upon remand within the shortest possible time. It would be open to her to accede to

any prayer for interim relief, if made by the petitioner in the event proceeding is dragged.

31. The revisional application accordingly stands allowed.

32. Since the petitioner has suffered the ordeal for all these years and has been without any succour and has suffered immensely in the meanwhile which cannot be compensated in any manner, however, it is apposite that she should be awarded some costs. It is directed that she would be entitled to a cost assessed at 200 gms to be paid by the opposite party within four weeks from this date.

Revisional application allowed.

Costs assessed at 200 gms.